

BOOK REVIEWS

Federal Unfair Competition Actions: Practice and Procedure Under Section 337 of the Tariff Act of 1930

By Donald Knox Duvall. New York, New York: Clark Boardman Company, Ltd., 1990 (to be published annually), pp. 633, \$95.00 (paperbound).

In 1974 Congress transformed a hitherto obscure government agency, the U.S. Tariff Commission, into the U.S. International Trade Commission (ITC), which was to become a major United States Government agency for regulating international trade. Among the provisions of the Trade Act of 1974, which created the ITC, were significant amendments to section 337 of the Tariff Act of 1930. Congress originally enacted this statute as section 316 of the Tariff Act of 1922 and then as section 337 of the 1930 Tariff Act, better known as the Smoot-Hawley Act. As amended in 1974, section 337 made unlawful any unfair methods of competition or importation, the effect of which would be to destroy or substantially harm an industry efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.

Until the 1974 amendments, section 337 was largely a moribund statute. Very few cases were filed under the statute, largely because of the perception that its procedures were unwieldy and its remedies were anemic. In the 1974 Act Congress sought to remedy these deficiencies. Among the most significant of the 1974 changes to the law was the statutory requirement that a section 337 investigation be completed within twelve months, or eighteen months in a more complicated case. Previously there were no time limits on section 337 investigations, and they tended to drag on *ad infinitum*. Congress also made the ITC decisions final, subject only to presidential veto for policy reasons. Furthermore, Congress broadened the remedies under section 337 to include a cease and desist

order in addition to an exclusion order. Under the 1930 Act the old Tariff Commission's decisions were merely recommendations to the President, many of which were never acted upon.

Finally, Congress modified the legal process under which the ITC conducted section 337 investigations by placing the process under the formal adjudicative provisions of the Administrative Procedure Act. This modification significantly increased not only the rights of the complainant under the statute, but also the rights of the respondents. The Administrative Procedure Act requires that hearings be held on the record with full due process rights before a federal administrative law judge. The Act also requires that decisions be rendered in writing with findings of fact and conclusions of law.

Although Congress may not have envisioned the far-reaching consequences of these amendments, the changes have transformed section 337 into a potent trade law. In effect, Congress created a mini-federal court with fixed time limits for adjudicating trade cases. The ITC essentially adopted the Federal Rules of Civil Procedure in its regulations for implementing the amended statute, and the administrative law judges basically applied the Federal Rules of Evidence for conducting the hearings. Thus, section 337 proceedings began to take on all the appearances of a federal district court case.

The new statute also provided many advantages that were not available for potential claimants in a federal district court. The strict requirements of personal jurisdiction and venue did not apply because of the ITC's national jurisdiction and its in rem powers over imported goods. Also, the ITC had nationwide subpoena power. The most important advantage was the time limitation. While complex civil litigation could often become bogged down in the courts, the ITC had to complete the investigation and render a final decision within one year.

These advantages proved attractive to complainants. The number of cases filed under section 337 increased geometrically. Since the 1974 Act, complainants have filed over 300 of these cases. The amended statute proved to be very effective in remedying unfair trade practices concerning intellectual property, particularly patents and trademarks. The in rem aspect of the statute readily lent itself to the product-related nature of an intellectual property case. Indeed, over 90 percent of the cases filed under section 337 since the Trade Act of 1974 have concerned intellectual property.

The creation of this new and highly effective trade statute had its critics, particularly among U.S. trading partners. These trading partners bitterly complained that section 337 was itself a nontariff trade barrier. They argued that section 337 provided for the exclusion of goods from the United States without adequate due process and in violation of international treaties, particularly the GATT. On the other hand, American industry and the intellectual property bar found section 337 to be a valuable weapon against unfairly traded imported goods. These groups formed a strong domestic constituency with significant power in Congress in support of the statute. A large trade bar of attorneys has

arisen around the law since 1974. These attorneys have even formed their own specialized ITC Trade Lawyers Association concerned totally with practice before the ITC under section 337.

One shortcoming of ITC section 337 practice has been the absence of a comprehensive analysis of the statute. In *Federal Unfair Competition Actions: Practice and Procedure Under Section 337 of the Tariff Act of 1930*, Donald Duvall, the former Chief Administrative Law Judge of the ITC, has written probably the most detailed study of section 337 to date. Previously one had to rely on law review articles, together with isolated chapters in general trade treatises, for an analysis of the statute. The ITC's decisions were not fully reported, and ITC practitioners often had to rely on the Commission's typed copy of a decision, particularly for early cases. Law firms involved in ITC practice prided themselves on the esoteric nature of their collections and rivaled each other on their completeness.

Now, in one work there is an exhaustive analysis of the statute, replete with case citations. For this alone, Judge Duvall is to be commended. *Practice and Procedure Under Section 337* is clearly written and is not just another dry academic tome or practitioners' guide. It can be used as a general text for both the student and practitioner and it is designed in a clear and coherent manner to be read in its entirety. Conversely, the structure of the book allows it to be used as a quick reference guide that can direct one into the substantive case law with appropriate commentary. It can also be used as a general reference work for each distinct aspect of ITC practice.

Judge Duvall begins with a history of the statute including its inauspicious beginnings. As part of the infamous Smoot-Hawley Tariff Act, section 337 has been labeled a protectionist law thinly veiled under the guise of an unfair trade statute. Duvall argues, however, that a fair reading of section 337 indicates that it is aimed at free but fair trade. Duvall insists the statute makes illegal only those imports that cause injury to a domestic industry by competing unfairly, such as infringing a U.S. patent or trademark right.

Thus, at the beginning of his work, Judge Duvall posits the core question that has underlain section 337 from its inception. Is section 337 a protectionist statute, which itself is an unfair trade practice, or is it a highly effective law to prevent unfair trade practices in the United States? Duvall argues cogently for the latter. In his analysis of the history and importance of section 337, he points out the growing importance of the statute to domestic manufacturers, and particularly to owners of U.S. intellectual property rights. A 1988 ITC report found that American industry is losing \$60 billion a year to counterfeit trade and infringement of intellectual property rights. This distortion of trade, which affects most industrial countries, was the primary impetus for the Ministerial Declaration at the Uruguay Round of Multilateral Trade Negotiations to include intellectual property rights as a matter for negotiation for inclusion under the GATT.

Judge Duvall provides an excellent analysis of the Uruguay Round negotiations concerning intellectual property, the so-called "TRIPS" talks. He analyzes the course of those negotiations and the various compromises that were made in order to obtain an agreement. He describes in detail the breakdown of the entire Uruguay Round in December 1990 over agricultural trade, and explores whether talks will be renewed. Finally, Duvall explores the implications for intellectual property, and section 337, if the Uruguay Round is renewed, and the importance of a GATT-enforced framework for effective enforcement of intellectual property rights.

Practice and Procedure Under Section 337 lucidly sets forth the proposed standards for a GATT intellectual property code without proselytizing the position of the United States, or any other negotiating country. Rather, Duvall sets forth the concerns of each of the major contracting parties. Of particular interest is the detailed discussion and analysis of the conflict between the so-called G-10 Group of hard-liner developing countries, led by India and Brazil, and the coalition of developed and developing nations, led by the United States and the European Community (EC), known as the Group of 48 or G-48.

The dispute between these two groups arises out of a difference of philosophy concerning the nature of intellectual property. What is neo-economic colonialism to the G-10 countries is nothing less than piracy to the G-48 countries. The two groups are often operating from diametrically opposed premises. This dispute makes it all the more remarkable that the contracting parties have been able to achieve a level of consensus at all. Negotiators attribute this to what has been called the cooperative "spirit of Punta," named after Punta del Este, the city where the Uruguay Round began. The consensus is more attributable to the mutual recognition that a coherent international trading system is in everyone's best interest. Most contracting parties realize that all would suffer if a consensus were to break down and the world were to split into semiautonomous trading blocs.

The issue of border controls in these talks may have a significant effect on section 337. While there are slight disagreements as to the parameters of border controls, practically all the contracting parties agree that there must be an effective border control system. After all, one of the main purposes for placing intellectual property under the GATT, as opposed to continuing multilateral enforcement under the conventions administered by the World Intellectual Property Organization (WIPO), such as the Paris Convention or the Berne Convention, was the complete inadequacy of enforcement proceedings. To be effective, the national regime that implements a multilateral agreement on intellectual property must include effective controls enforced at the national borders to prevent and deter the importation or exportation of infringing goods.

Section 337 has proven to be an extremely effective border control. As administered by the ITC, the statute has provided an expeditious and relatively fair quasi-judicial process for the adjudication of complaints against unfair methods

of competition based on intellectual property rights. The ITC, through the basic adoption of the principles embodied in the Federal Rules of Civil Procedure and the Federal Rules of Evidence, has created a forum that provides the complaining party with a quick and effective resolution of its petition, while providing the responding party with the full panoply of due process. Perhaps the best index of the fairness of ITC proceedings is the statistical analysis of the outcome of the cases. Since the 1974 Trade Act amendments, in over 300 investigations, 48 percent of the cases were decided in favor of the respondents—the foreign manufacturers and their importers. Further, in the fifteen years since the Trade Act, only 38 percent of all the ITC's final determinations have been appealed to a court for judicial review.

Perhaps this excellent record has made section 337 more controversial with U.S. trading partners. The more effective the law, the more those affected are wont to complain. The EC, Canada, and Japan have been particularly vehement in their opposition to the statute. This has led to complaints filed before the GATT, first by Canada and then by the EC, that section 337 is “inconsistent” with U.S. obligations under the GATT. These complaints finally culminated in 1989 with a finding by a GATT panel that section 337 was indeed violative of article III of the GATT for failure to give national treatment to contracting parties. Of particular concern to the panel were the immutable time limits for conducting a section 337 investigation, which it found denied the responding party adequate time to prepare its defense. The GATT panel also viewed with disfavor the complaining party's ability to file both in a federal district court and in the ITC on the same cause of action, and the complainant's choice of forum against importers and foreign manufacturers. The panel ruled that this freedom of choice was a denial of national treatment because these options were not available in a purely domestic case. Finally, the GATT panel ruled it was also a denial of national treatment that section 337 did not provide for counterclaims, while suits in a federal district court did provide for them.

After extensive procedural delay, the U.S. Trade Representative, Carla Hills, announced that the United States would not block the GATT panel report on section 337, and that the GATT Council had adopted the report. However, Ambassador Hills announced on the same day that the United States did not agree with much of the reasoning behind the GATT report and would continue to enforce section 337 until Congress enacted legislative change, an occurrence not likely except as part of a broad trade bill implementing a new trade agreement reached under the Uruguay Round. President Bush reiterated that section 337 would be fully enforced pending legislative modification, and that the GATT panel report did not provide a basis for changing current practice with respect to presidential review of section 337 orders.

Thus, section 337, once an obscure statute administered by a backwater agency, suddenly became one of the major international trade issues in the Uruguay Round. The United States' allegedly duplicitous response to the GATT

panel ruling infuriated both the EC and Japan. On the other hand, many members of Congress and sections of U.S. industry felt the USTR had badly bungled the whole GATT process and had stumbled into the worst possible situations: accepting a GATT panel report and then announcing it would not abide by the report.

The issue has subsided somewhat, probably because the industrial countries have recently been more concerned with threatening each other over agricultural subsidies. Further, the EC, and particularly Germany, appear to have desisted from their once adamant position that there would be no intellectual property code under the GATT as long as section 337 existed. The tumbling of the Berlin Wall has Germany otherwise preoccupied, and the rest of the EC and Japan do not seem willing to scuttle the Uruguay Round over what can only be described as a highly technical issue. In its draft agreement, submitted in June 1990, the EC appears to have accepted the proposition that the United States can conform section 337 to the new GATT intellectual property code in its implementing legislation.

Judge Duvall presents this evolution of section 337 with precision and clarity. While he clearly advocates that section 337 has been an effective trade statute and is not a nontariff trade barrier, he deals fairly with the arguments of U.S. trading partners, particularly the Europeans. While he disagrees with the GATT panel decision, he sets forth the reasons for the panel's findings and analyzes the underlying legal theories upon which the panel relied. Such precision and objectivity is rare in an advocating academic analysis.

Practice and Procedure Under Section 337 is not just an academic treatise on the law. The study is also an extremely useful guide to practice under the statute. After describing the distinguishing characteristics that have made section 337 so effective and so controversial, and explaining the uniquely independent role of the Commission Investigative Attorney, the book sets forth in logical manner the conduct of a section 337 investigation through discovery and trial to final judicial review. Each section is logically structured and is complete with commentary, practice tips, and case citation. Thus, the book can be used as a ready reference manual and research guide. Judge Duvall covers each possible aspect of a section 337 investigation, including post-adjudicative enforcement and advisory opinion proceedings. This allows the practitioner to focus on a particular area or problem of concern. The table of cases is exceptionally complete, and the appendices, particularly the "Forms," are helpful without being voluminous. The selected bibliography provides an excellent reference guide for those who wish to do further research.

Finally, Judge Duvall concludes his work with a chapter on "Strategic and Technical Considerations." In many ways, this is the most intriguing part of the book. Judge Duvall draws on his years of experience as an administrative law judge and as a practitioner to give many practical insights into the conduct of a section 337 investigation which even "old hands" will find of interest.

Taken together, this is an excellent work. It fills a void in the literature on section 337 and it is a unique combination of a scholastic treatise and a practical research guide. For this, Don Duvall is to be commended.

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Developments in the Law of Treaties 1945–1986

By Shabtai Rosenne. Cambridge, England: Cambridge University Press, 1989, pp. xxxv, 535, \$75.00.

Rosenne is a former member of the International Law Commission; his absorption in its work and his fascination with the intricacies of the codification process are unmistakable in this book. His impressive command of the details of the Commission's work and of the complex sequence of its drafts are, however, not easily communicated to the reader. This book will be used mainly for reference purposes. The dust jacket indicates that the book is aimed at practitioners, whether diplomats, arbitrators or politicians. It is hard to imagine anyone actually reading the book from cover to cover, and perhaps it was not intended to be.

The difficulties of content are matched by the barriers of Rosenne's style. His sentences are long and complicated; parentheses and subordinate clauses abound. His extensive use of Latin phrases (all untranslated) helps to make his arguments inaccessible. The use of *Ex consensu advenit vinculum* as a section heading and his frequent references to the principle *eius est interpretari legum cuius est condere* seem almost wilfully obscure.

Yet it would be a shame if these difficulties deterred readers. Rosenne has produced much interesting material on the history of the law of treaties. His main focus is on the codification of the three main conventions on the law of treaties: the 1969 Vienna Convention of the Law of Treaties; the 1978 Vienna Convention on Succession of States in respect of Treaties; and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Rosenne also discusses international case law where relevant. His attitude to the International Court of Justice is often critical and occasionally, as towards *Nicaragua v. USA*, vehemently hostile.

The most obvious and most disappointing gap in the book is the absence of any systematic examination of state practice. Such practice is, of course, much more difficult to track down than are the records of the International Law Commission.

As in his earlier book, *Breach of Treaty*, Rosenne's approach is rather abstract and theoretical; he concentrates on the drafting history of the Vienna Conventions rather than on the subsequent practice. The main value of this book therefore lies in its contribution to a better understanding of the Conventions.

Rosenne begins by discussing what he calls "unaddressed issues." (p. 1) As he explains,

The expression is used to point towards issues which, for one reason or another, the International Law Commission or the Vienna Conferences decided not to include in their work on the law of treaties, mainly because they were not, in their view, really germane to the law of treaties as it was taking shape, or because professional or political opinion was so divided that no acceptable compromise was feasible.

Because the Vienna Conventions concentrate on the treaty as instrument rather than on the obligations flowing from treaties, the question of the performance of treaty obligations is the major area not regulated by these Conventions. At the time of writing Rosenne was optimistic that the International Law Commission would deal with this as part of its work on State Responsibility. As it has turned out, it is extremely unlikely these hopes will be realized. Significant discrepancies remain between the Vienna Convention on the Law of Treaties and the Commission's Draft Articles on State Responsibility. As Rosenne points out, the latter provisions on circumstances precluding wrongfulness are difficult to reconcile with the Vienna Convention's provisions on invalidity and termination.

A clash between these two sets of rules recently materialized in the 1990 arbitration between New Zealand and France. France had repatriated the two French agents responsible for blowing up the *Rainbow Warrior* without obtaining the consent of New Zealand as required by the treaty between the two states. To justify this apparent breach of treaty, France invoked the law of state responsibility, in particular the rules on force majeure and distress, as circumstances precluding wrongfulness. New Zealand argued that only the Vienna Convention rules on termination and suspension of treaties should apply. In a very controversial decision the arbitration tribunal held that the rules of state responsibility were applicable to the termination of the treaty. This case was decided after Rosenne's book was finished and is still unreported, but it is a striking illustration of the fundamental problems left unresolved by the International Law Commission.

The main theme of Rosenne's second chapter is the distinction between binding and nonbinding international instruments and the role of the latter in international relations. Interest in this topic has increased enormously since the Helsinki Final Act, and again Rosenne is optimistic about developments outside the Vienna Conventions. He believes the nonbinding agreement "has constructive potentialities for dealing with the unprecedented character of many international conflicts." (p. 134)

Chapter Three is a fairly straightforward study of good faith in the codified law of treaties. Chapter Four is much more controversial: Rosenne challenges the

normal assumption that the constituent instrument of an international organization is a multilateral treaty. He attacks what he calls the "nihilistic approach" (p. 227) of the International Court of Justice to the interpretation of such constituent instruments: he is strongly opposed to treating the practice of organs of international organizations as decisive. He fears this approach will lead to inconsistency and unpredictability. But the Court's approach is firmly established. Rosenne's response is to say that this method of interpretation is so different from the method for normal multilateral treaties that it is doubtful whether the UN Charter and other constituent instruments should continue to be regarded as treaties. Rosenne welcomes the articles in the Vienna Conventions that allow for the special treatment of such instruments.

Chapter Five on the settlement of treaty disputes under the Vienna Conventions covers a wide range of topics, but the central theme is the relation between the dispute settlement provisions and the substantive law of treaties. Rosenne acknowledges that the viability of articles 65 and 66 of the 1969 Convention, and their equivalents in the other Conventions, is yet to be tested, but he remains optimistic. He describes the crucial role played by article 66 in the drafting history of the Conventions and goes on,

Article 66 did more than "save" the Vienna Conference in 1969, and the revised Article 66 did more than "save" the Vienna Conference in 1986. They have taken halting steps towards creating new politically oriented dispute-settlement procedures in what might be an extremely sensitive area of international law and relations. (p. 345)

The last chapter on the United Nations and the law of treaties covers questions of considerable technical and practical interest on the codification process, the conduct of international conferences, and the problems of multilateral treaty-making.

Throughout the book the main emphasis is inevitably on the 1969 Convention. Although the 1969 Convention did not come into force until January 27, 1980, applies only to treaties that enter into force after that date, and has been ratified by less than 50 percent of states, Rosenne correctly describes it as a major step forward in international law. Its impact is much greater than the bare facts mentioned above would suggest. Rosenne's book helps us to understand the strengths and weaknesses, the provisions and omissions of all the Vienna Conventions in the light of their drafting history. It is to be hoped that he will now follow this book with another on treaties in state practice.

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On the Law of Nations

By Daniel Patrick Moynihan. Cambridge, Massachusetts: Harvard University Press, 1990, pp. 211, \$22.50.

While the last decade was one of the most fruitful in terms of the development of private international law in the United States, public international law was neglected or even disdained in many quarters. The thrust of this latest book by Senator Daniel Patrick Moynihan is to lament this state of affairs and to query whether the time is right for the United States to recommit itself to a regime of law governing international relations.

The method of Senator Moynihan, a former U.S. Ambassador to the United Nations, is to combine an objective and generally accurate historical overview with more subjective accounts of his own involvement in, and reactions to, some of the historical incidents he describes. The technique results in compelling portraits of the world's and his evolution towards recognizing the importance of public international law. In this fashion, he leads the reader through his argument that our nation's interests lie in a return to respect for international law.

Moynihan points out that our Founding Fathers had such respect. Blackstone's *Commentaries on the Laws of England*, published in Philadelphia in 1771–72, and other sources familiar to the Founders, frequently referred to the concept of law binding all nations. The United States Constitution itself makes treaties the "supreme Law of the Land." Kent's *Commentaries on American Law*, the great early-nineteenth century treatise, the first of its kind in the United States, begins by emphasizing that the "faithful observance" of the law of nations is "essential to national character, and to the happiness of mankind."¹ In 1990 the U.S. Supreme Court confirmed, in the *Paquete Habana* case, that "international law is part of our law."²

The idea of international law as binding law was common to both President Wilson, who nevertheless failed to persuade the Senate to ratify U.S. membership in the League of Nations, and President Roosevelt, whose steadfast support of international law led to the League in a different form—the United Nations. Moynihan views it as ironic that perhaps the third great spokesman for international law in this century, after Wilson and Roosevelt, is Mikhail Gorbachev, whose country's emphasis on ideology blocked progress in the United Nations for much of the post-war period.

Moynihan points to a succession of incidents where Reagan administration officials were either "ignorant or contemptuous" of international law (p. 121). While Moynihan was a partisan participant in the events he describes, his ob-

1. 1 J. KENT, COMMENTARIES ON AMERICAN LAW (New York: O. Halstead, 1826).

2. The *Paquete Habana*, 175 U.S. 677, 700 (1990).

servations have the force of authority because he consistently weighed in on what the vast majority of scholars and practitioners of public international law consider the "right" side. Whatever else one might think of the wisdom or folly of CIA assassination manuals, the invasion of Grenada in 1983, the mining of Nicaraguan harbors in 1984, the withdrawal without the required notice form the compulsory jurisdiction of the World Court, or the Iran-Contra affair, the 1980s was not the best decade for international law in the United States.

The beginnings of the 1990s have not made Moynihan much more optimistic regarding prospects for international law. He states that the election of President Bush, a former Permanent Representative to the United Nations, brought a "return to normalcy" in America (p. 155). Yet he believes that dark undercurrents suggesting an empty, cynical, and manipulative view of international law persist.

Moynihan is disturbed when CIA Director William Webster, a former federal judge, again suggests that the prohibition on assassination of foreign leaders be relaxed. Another concern is the unprecedented authority now given the FBI to grab fugitives in foreign countries without the host government's knowledge or consent. Though Moynihan recognizes the popular support given the President in the invasion of Panama, he does not believe the suggestion that the invasion was a legitimate exercise of the right of "self-defense" under article 21 of the U.N. Charter. Further, he finds it hard to miss the parallels between the U.S. occupation of the Nicaraguan Ambassador's Panamanian residence, which the *Washington Post* characterized as virtually "condoned" by President Bush,³ and the 1979 storming of the U.S. Embassy in Iran. Both were basic violations of the Vienna Convention on Diplomatic Relations.

These examples represent what Moynihan laments as the "fading from the American mind of the idea of the law of nations." (p. 99) Just after the mining of the Nicaraguan harbors became known, then-U.N. Ambassador Jeane Kirkpatrick gave a widely publicized speech in which she argued that the United States need not, and should not, consider itself bound by rules of law not complied with by its adversaries. Robert Bork published the same argument shortly before the Panama invasion. Moynihan views such arguments with utmost suspicion, not only because they negate the very idea of law as binding obligation (and transform the law into a series of rhetorical rationalizations for any conceivable action), but also because they threaten to undermine our ideas of ourselves and our country.

This book is written for a popular as opposed to a legal audience, and therefore sweeps with a broad brush and lacks some of the technical detail that might be of interest to readers of *The International Lawyer*. On the other hand, the book is written in an engaging style, appealing to fans of Moynihan but distracting to those impatient with his patrician manner. Like Moynihan's speech, the style is

3. *Washington Post*, Jan. 3, 1990, at A14.

highly rhetorical, a bit bombastic, and more than a bit idiosyncratic. However, to the receptive reader the style should enhance rather than detract from the pleasure of reading the book.

The relatively high degree of respect for international law in actions taken in the Persian Gulf crisis suggests that the United States is at a crossroads with respect to international law, and that Moynihan's book comes at a propitious time. Readers of this book will not be surprised that throughout the crisis Moynihan steadfastly advocated heavy reliance upon concepts of collective security through the United Nations. Moynihan is surely right in reiterating that, in the long run, our nation has more to gain than lose by reinforcing a regime of law over a regime of force in international relations.

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